

ESTATE OF ASA COTTONWOOD

IBIA 79-3

Decided April 10, 1979

Appeal from an administrative law judge's order determining heirs after reopening.

Affirmed.

1. Indian Probate: Children, Illegitimate: Generally--Indian Probate:  
Evidence: Presumptions

In a case of illegitimacy, it is a reasonable presumption that a father may refrain from widely proclaiming parenthood. Here, however, the decedent had sworn before an officer of the court that he was the father of the appellee.

2. Indian Probate: Trust Property: Generally

In the event that the court approved agreement signed by decedent constituted a judgment against trust property, it is null and void absent approval by the Secretary of the Interior.

APPEARANCES: Gertrude Cottonwood, appellant, pro se; Josephine Ann Four Swords (Red Tomahawk), appellee, pro se.

OPINION BY ADMINISTRATIVE JUDGE HORTON

This is an appeal from an Order Determining Heirs After Reopening entered by Administrative Law Judge Garry V. Fisher on September 21, 1978. Appellant is Gertrude W. Cottonwood, surviving spouse of the deceased, Asa Cottonwood, Standing Rock Allottee 2663, who died intestate on November 28, 1976.

Appellant's notice of appeal, filed November 3, 1978, is from that part of Judge Fisher's order which finds Josephine Ann Four Swords (Red Tomahawk) to be a natural daughter of the decedent and Jennie Four Swords.

An order determining heirs was first entered in this estate on July 29, 1977. Based on correspondence from various interested parties, including the superintendent of the Standing Rock Agency, it became evident to Judge Fisher that several heirs at law of the deceased had been omitted from the determination of heirship. In addition, Judge Fisher was advised by the superintendent's office that Josephine Ann Four Swords, appellee herein, appeared to be an illegitimate daughter of the deceased who was also entitled to a share of the estate. By order dated January 18, 1978, Judge Fisher allowed all interested parties to submit statements for or against reopening of the estate and redetermination of heirship. Thereafter, on March 18, 1978, Judge Fisher ordered the subject estate reopened.

On April 19, 1978, Judge Fisher conducted a hearing upon reopening at Fort Yates, North Dakota. Among other things, it was a purpose of this hearing to determine whether Josephine Ann Four Swords is a natural daughter of Asa Cottonwood. Appellant appeared at the hearing pro se.

In support of his revised heirship determination that Josephine Ann Four Swords is a daughter of the decedent, Judge Fisher refers in his September 21, 1978, decision to a written acknowledgment of paternity and child support agreement signed by Asa Cottonwood on August 16, 1935. This document was approved by District Judge F. T. Lembke, Sixth Judicial District, Sioux County, North Dakota, on August 31, 1935.

#### Discussion and Conclusions

It is the Board's conclusion that Judge Fisher's revised determination of heirship must be affirmed.

The burden of proof in this case is on appellant to show that it was error for the Administrative Law Judge to find Josephine Ann Four Swords to be a daughter of the decedent. Subsequent to docketing of this appeal, the only statements filed with the Board on the question before us are supportive of the Administrative Law Judge's determination. See statement of Josephine Four Swords Red Tomahawk (appellee), filed February 7, 1979; statement of Jennie (Four Swords) Rainbow, filed February 7, 1979; and statement of Lillian Ironbull Martinez, filed December 26, 1978.

At the April 19, 1978 hearing, appellant was provided full opportunity to adduce evidence that the decedent was not the father of Josephine Ann Four Swords. The only evidence produced along this line was appellant's own testimony that the decedent did not tell her that he was the father of Josephine (Tr. at 5). Appellant admits, however, that others in the community had heard such reports. Ibid.

[1] In a case of illegitimacy, it is a reasonable presumption that the father may refrain from widely proclaiming parenthood. Estate of Louis Harvey Quapaw, 4 IBIA 263 (1975). In the case at hand, however, the decedent swore before an officer of the court that he was the father of Josephine Ann Four Swords. Such occurrence has not been refuted by appellant.

Based on the above, the Board holds that appellant has not satisfied her burden of proof in this case. We think Judge Fisher was correct in finding Josephine Ann Four Swords to be decedent's daughter.

[2] As a final matter, various briefs filed in support of the appellee inquire as to her right to 80 acres of land, which under terms of decedent's agreement signed August 16, 1935, were to be deeded her by the decedent. Based on the description of the 80 acres set forth in the agreement, it does not appear that the land described is a part of the estate involved in this probate. If in fact the land described in the agreement is trust property of the deceased, unless the agreement in question was approved by the Secretary of the Interior it could not serve as a valid conveyance of such land. A conveyance of trust land requires that the particular Indian who holds beneficial title to the land apply for the Secretary of the Interior's approval of the contemplated conveyance. Conroy v. Frizzell, 429 F. Supp. 918 (D.S.D. 1977). Thus, in the event that the court-approved agreement signed by decedent in this case constituted a judgment against trust property, it is null and void absent Secretarial approval. See Mullen v. Simmons, 234 U.S. 192 (1914); Estate of Philip Tooisgah, 4 IBIA 189 (1975), aff'd in Tooisgah v. Kleppe, 418 F. Supp. 913 (D. Okla. 1976). The evidence before us does not indicate that the contemplated conveyance was approved or considered by the Secretary or his authorized representative.

Therefore, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Determining Heirs After Reopening entered by Administrative Law Judge Garry V. Fisher on September 21, 1978, is affirmed.

This decision is final for the Department.

Done at Arlington, Virginia.

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Wm. Philip Horton  
Administrative Judge

We concur:

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Mitchell J. Sabagh  
Chief Administrative Judge

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Alexander H. Wilson  
Administrative Judge